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In The

Supreme Court of the United States

OCTOBER TERM, A. D. 1944

No. 1297

STATE OF WISCONSIN,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PETITION OF THE STATE OF WISCONSIN FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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The lower court held in effect that the Tomahawk Dam was subject to the jurisdiction of the respondent Commission upon the basis of a finding that the Wisconsin River is a navigable water of the United States 11

It was error for the lower court to fail or refuse to determine the question of whether the Tomahawk Dam affects foreign or interstate commerce 11

Consequently, the decision of the lower court was based upon a misconception of the provisions of the Federal Power Act and the powers vested in the respondent Commission 12

The record is devoid of evidence upon which a valid finding could be made that the Tomahawk Dam affects or ever could affect foreign or interstate commerce 12

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The order here involved operates to deprive the State of Wisconsin of its sovereign right to regulate the use, level and flow of the Wisconsin River and through the recapture clause in the license involved may operate to deprive the State of Wisconsin of revenues from taxation of the Tomahawk Dam 13-14

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To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, State of Wisconsin, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review the judgment of that court entered on the 26th day of February, 1945, in the case of State of Wisconsin and Public Service Commission of Wisconsin vs. Federal Power Commission, the docket number of which in said court is 8463. A certified transcript of the record in the case, including proceedings in said Circuit Court of Appeals, is furnished herewith.

SUMMARY AND SHORT STATEMENT OF THE MATERIAL INVOLVED

The judgment, review of which is herein prayed for, affirmed an order of the Federal Power Commission under date of July 30, 1943, which directed the Wisconsin Public Service Corporation, a Wisconsin corporation, to file an application for a license under the Federal Power Act for the operation and maintenance of the so-called Tomahawk Dam on the Wisconsin River, located near the source of that river in Lincoln County, Wisconsin. The judgment of the Circuit Court of Appeals thus entered was rendered upon a petition for review of said order of the Federal Power Commission made by and on behalf of said Wisconsin Public Service Corporation and by and on behalf of the State of Wisconsin and the Public Service Commission of Wisconsin.

JURISDICTION

1. The statutes under which jurisdiction is invoked are Section 240(a) of the Judicial Code, 28 U. S. C. A. §347, and Section 313 of the Federal Power Act (16 U. S. C. A., §825 (1)). The date of the judgment of the United States Circuit Court of Appeals for the Seventh Circuit Court, sought to be reviewed, is February 26, 1945.

QUESTIONS PRESENTED

1. Was the order of the Federal Power Commission made under date of July 30, 1943 (thereafter affirmed by denial of an application for a rehearing with respect thereto on February 21, 1943) which required said Wisconsin Public Service Corporation to apply for a license under the Federal Power Act for its said Tomahawk Dam, within the power and authority validly vested in said Federal Power Commission?

2. Does the order of the Federal Power Commission, above described, impair or infringe the sovereign rights or privileges of the State of Wisconsin?

REASONS RELIED UPON FOR ALLOWANCE OF A WRIT OF CERTIORARI

The State of Wisconsin contends:

(1) That, as a sovereign state of the United States, it has jurisdiction and authority to regulate the use, level and flow of all flowing streams within its borders, subject only to the exercised authority of the federal government under the Commerce Clause of the Federal Constitution.

(2) That under the evidence in the record the Wisconsin River at and in the vicinity of the so-called Tomahawk Dam is not a navigable water of the United States such that the Congress, under said Commerce Clause, has power to vest in any federal agency the power or authority

to regulate the use, level and flow of the waters of the Wisconsin River at or in the vicinity of said Tomahawk Dam.

(3) That even if it could be said or held that the waters of the Wisconsin River at or in the vicinity of the Tomahawk Dam are navigable waters of the United States and subject to the jurisdiction of Congress as aforesaid, it is nevertheless true that the Congress has not, either by the Federal Power Act, or otherwise, vested any power or authority in the Federal Power Commission to regulate the use, level and flow of the waters of the Wisconsin River at or in the vicinity of said Tomahawk Dam.

(4) That if the first and either the second or the third of the foregoing contentions should be sustained by this court, the purported exercise of federal authority, by and through the order here involved, requiring that an application be made to obtain a federal license for the operation and maintenance of said Tomahawk Dam, constitutes an invasion of the sovereign rights and privileges of the State of Wisconsin.

(5) That the judgment of the lower court affirming such order was made upon a misconception of the extent of the authority vested in the respondent Commission by the Federal Power Act.

(6) That the holding of the lower court as to the navigability of the Wisconsin River is contended to be contrary and is probably contrary to the decisions of this court.

(7) That the order under review invades the sovereign rights and privileges of the state, and the validity of such order is therefore a matter of great and national importance.

Respectfully submitted,

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